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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff-Appellee,

v.

LORENZO BACA,

Defendant-Appellant.

Case No. 1:08-CR-00080 OWW
(Magistrate Case No. 6:05-mj-156-WNW)

APPELLANT'S REPLY BRIEF

I
THE EVIDENCE DOES NOT SUPPORT A FINDING THAT MR. BACA WAS ENGAGED IN OR SOLICITED BUSINESS IN YOSEMITE NATIONAL PARK WITHOUT A PERMIT

The federal regulation under which Mr. Baca was charged and convicted, 36 CFR 5.3[1] requires that an individual be engaged in business in Yosemite National

[1] In Appellee's Brief, the government actually cites 36 CFR §5.5. This regulation requires written permission from the Superintendent for commercial photography, motion pictures or television. Mr. Baca was actually acquitted of this charge. RT 6, 103-104, which is not the subject of this appeal.

Park without a permit, or to have solicited business in Yosemite National Park without a permit. The magistrate found that Mr. Baca was at Big Time 2002 to "conduct a business," *i.e.*, that Mr. Baca was "there to make a film that [he] intended to sell," and which he did sell to "Mr. Puffer and to the museum". RT 6-104. Appellee has argued that Ms. Brocchini's testimony regarding her purchase of Mr. Baca's video for the museum store is not relevant to the magistrate's findings that Mr. Baca had engaged in a business without a permit. However, the magistrate found that Mr. Baca's selling of the videos to the museum was evidence that Mr. Baca had engaged in a business without a permit. RT 6-104. Ms. Brocchini as the sales station co-ordinator for the Yosemite Association, testified that vendors such as Mr. Baca did not need a permit or business license to sell items to the store, because Yosemite Association had the necessary business license and permit to sell the items in the park. 1-124, 3-93. Mr. Baca's selling videos, or for that matter anything to Ms. Brocchini as the buyer for Yosemite Association was not conduct prohibited by 36 CFR 5.3.

Offering for sale or selling the videos to Mr. Puffer or anyone else not within the boundaries of Yosemite National Park, was conduct not prohibited by the language of this regulation. The regulation specifically states that one of the elements of the targeted conduct was that the business either engaged in or solicited occurred within the park. Apart from his selling and soliciting the sale of the videos to Ms. Brocchini, which was not prohibited conduct, there is absolutely no evidence that Mr. Baca sold, solicited, advertised or conducted any commercial activity in Yosemite National Park. None. Neither the appellee nor the magistrate

cited to any commercial activity within the park, and without such evidence, Mr. Baca's conviction must fail.

The magistrate's determination that filming in the Park with the intent to sell the film was sufficient evidence of "engaging in a business" as prohibited by 36 CFR 5.3. This conclusion is legally indefensible.

The language of the regulation prohibits "business operations" in the Park. Commercial activity or "engaging in business" generally means the advertising of a service or product for sale, or the selling of a service or product. The term "business" has the common definition of: "the purchase and sale of goods in an attempt to make a profit; a person, partnership, or corporation engaged in commerce, manufacturing or a service." Random House Webster's College Dictionary, 1995 edition. Clearly Mr. Baca's activities in filming a public event[2], Big Time 2002, does not fall within the purview of this definition. Filming in Yosemite National Park is not in and of itself prohibited conduct unless the filming is "commercial photography". "Commercial Photography" is specifically regulated by 36 CFR 5.5, which states:

> §5.5 Commercial photography.
>
> (a) *Motion picture, television.* Before any motion picture may be filmed or any television production or sound track may be made, which involves the use of professional casts, setting, or crews, by any person other than bona fide newsreel or news television personnel, written

[2] Appellee's assertion that Big Time is "very, very private and removed" is simply wrong. App Brf. P. 8:17-21. While ceremonies not in the valley may be private, those ceremonies are not the subject of the charges against Mr. Baca. The dancing, eating and other ceremonies held during Big Time in Yosemite Village which are the subject of these charges were open to the public. RT 1-10, 1-6; 1-62-63.

> permission must first be obtained from the Superintendent, in accordance with the provisions of the special regulations contained in part 5, subtitle A, title 43 of the Code of Federal Regulations.
>
> (b) *Still photography*. The taking of photographs of any vehicle, or other articles of commerce or models for the purpose of commercial advertising without a written permit from the Superintendent is prohibited.

Mr. Baca was acquitted of commercial photography. The magistrate found that Mr. Baca's filming of Big Time was not prohibited by this regulation:

> I'm not going to find you guilty of filming without a permit because I agree with our attorney that that statute as portrayed on the Internet and even as I sit here and read it, I'm not sure that I can say beyond a reasonable doubt that you needed a permit to do what you did.
>
> There's the issue of professional case. There's the issue of is this a motion picture within the meaning of this statute.

RT 6-103.

The finding that Mr. Baca's filming of Big Time did not contravene the prohibitions of 36 CFR 5.5, constrained the magistrate from using that same conduct, filming in the Park, as the bases for violating the more general prohibitions against operating a business in the Park of 5.3. The more specific language of 5.5 against commercial filming controls.

The focal point of the magistrate's finding was the fact that Mr. Baca filmed Big Time. If the filming element was taken out of Mr. Baca's conduct would the outcome be the same, *i.e.*, a violation of 5.3? For instance what if Mr. Baca instead of filming Big Time had drawn his observations, the dancers, each of the individuals interviewed, the roundhouse inside and out, etc., Further, what if these drawings were accompanied by a written narration exactly the same as the narration in the

film, and all this was done by Mr. Baca with the intent of selling his drawings and narration in the form of a book, and in fact he did sell two copies of this book to Mr. Puffer. Would this violate 36 CFR 5.3?

Another, example; a short story writer comes to the Park with the intention of writing a series of stories which he plans to sell to a magazine. The bases for his stories are his observations of Yosemite National Park, the Ahawhnee, the activities of Park staff and employees, some of whom he quotes and uses in his short-stories. Would the writer be subjected to prosecution under 5.3 for engaging in a business while in the Park? Of course not. Anyone can photograph the Park then sell those photographs and not be in violation of 36 CFR 5.3. The only difference between these scenarios and Mr. Baca circumstances was that Mr. Baca made a video which was filmed in the Park. This was not a violation of 5.5[3].

Mr. Baca's filming was not prohibited conduct, nor was his selling of the video prohibited by 36 CFR 5.3. There was no legal nor factual basis which supported the magistrate's conclusion to the contrary. Mr. Baca's conviction under 5.3 must be reversed.

II.
A MAGISTRATE'S POSSESSION OF A HANGMAN'S NOOSE IN HIS CHAMBERS IS OBJECTIVE EVIDENCE OF BIAS FOR WHICH HE SHOULD HAVE RECUSED HIMSELF

[3] This matter should have been relegated to the civil courts. The unhappiness of some of those depicted in Mr. Baca's video does not make the filming a crime.

The possession and retention of an object which through history has been identified with racial oppression and hatred is an "extrajudicial source" of prejudice. The magistrate's feelings and explanations is not the standard used to determine whether he should recuse himself from hearing a criminal matter. *Mayes v. Leipziger*, 729 F.2d 602, 607 (9th Cir. 1984). Appellee's blanket assumption that no reasonable person could have questioned Judge Wunderlich's impartiality based on his possession of a noose which was a gift from his friends is without legal substance. This is not the standard applied in reviewing a judicial officer's decision not to recuse himself from a case in which there is an appearance of partiality.

The magistrate's retention and display of a hangman's noose was evidence of partiality which required his recusal. His refusal to disqualify himself required reversal of Mr. Baca's conviction.

III.
CONCLUSION

The conviction of Mr. Baca must be vacated for all of the reasons argued above and contained in his opening brief.

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Respectfully submitted,

/s/Carolyn Phillips
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